# Petition

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

CITY OF ATLANTA, a municipal corporation

Petitioner,

vs.

WES OWEN, et al.; JOE MOSES, et al.; and AVIS CRUTCHFIELD, et al.;

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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Petitioner City of Atlanta
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OF COUNSEL:

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JOE M. HARRIS
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Atlanta, Georgia 30335

## QUESTION PRESENTED

Has federal law in the areas of regulation of aircraft in flight and regulation of noise and other emissions by aircraft in flight preempted state and local controls in these areas, including local controls in the form of state and common law actions for damages?

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| | ) | |
| Respondents. | ) | |

ENTRY OF APPEARANCE

Comes Now GARY S. WALKER and enters his appearance as counsel of record for Petitioner City of Atlanta.

Respectfully submitted,

Gary S. Walker

GARY S. WALKER

Counsel of Record for
Petitioner City of Atlanta

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

Petitioner City of Atlanta, a municipal corporation of the State of Georgia, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Georgia entered in the above-styled action on October 14, 1981.

## OPINIONS BELOW

The opinion of the Supreme Court of Georgia, not yet reported, is set forth in Appendix A. The opinion of the Court of Appeals of Georgia, 157

Ga. App. 354, 277 S.E.2d 338 (1981), is set forth in Appendix B. The opinion of the trial court, dated March 28, 1980, is set forth in Appendix C.

## JURISDICTION

The decision of the Supreme Court of Georgia which is sought to be reviewed was entered on October 14, 1981. This petition for certiorari is filed within ninety days from that date. The Court's jurisdiction is invoked under 28 U.S.C. §1257(3). Review by certiorari is sought on the ground that the Supreme Court of Georgia has determined a novel and substantial question arising under the Constitution of the United States and involving the application of this Court's decision in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 93 S.Ct. 1854 (1973).

## QUESTION PRESENTED

Has federal law in the areas of regulation of aircraft in flight and regulation of noise and other emissions by aircraft in flight

preempted state and local controls in these areas, including local controls in the form of state and common law actions for damages?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 8, Clause 3 of the Constitution of the United States:

> "The Congress shall have power to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes."

2. Article VI, Paragraph 2 of the Constitution of the United States:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State

to the contrary notwithstanding."

3. Federal Aviation Act of 1958, 49 U.S.C. §1301 et seq. (See Appendix D.)

4. Noise Control Act of 1972, 42 U.S.C. §4901 et seq. and 49 U.S.C. §1431. (See Appendix E.)

## STATEMENT OF THE CASE

Petitioner is the owner and operator of Hartsfield Atlanta International Airport (Atlanta Airport), the second busiest airport in the world. Serving approximately 42 million passengers a year, Atlanta Airport serves as the major transfer point in the southeast. In 1980, Atlanta Airport handled 612,525 aircraft operations, which included the transport of 181,783 tons of mail, 329,600 tons of air freight and 40,180,311 passengers. Thus, Atlanta plays a major role in the national air transportaiton system and has a major impact on interstate commerce as well as on the economy of the entire southeast region.

In 1977 Respondents, 1/ who reside in the vicinity of Atlanta Airport, brought actions against Petitioner as owner and operator of Atlanta Airport alleging damages in excess of $18,000,000.00 resulting from the flight of aircraft over or near their property. Respondents' complaint set forth three theories of recovery: nuisance, trespass, and inverse condemnation. Petitioner filed a motion for a partial summary judgment in its favor as to the theories of nuisance and trespass for damages resulting from aircraft in flight. Remaining, and not at issue here, are Respondents' claims for damages for an unconstitutional taking of their property under the theory of inverse condemnation.

The trial court granted Petitioner's motion with regard to the nuisance and trespass theories of recovery, finding that these avenues of recovery had been precluded by exclusive and pervasive

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1/ A list of the names of all of the parties involved in this action is set forth in Appendix F.

federal law preemption in the areas of regulation of flight of aircraft, as well as the regulation of noise and other emissions from aircraft in flight. The Court of Appeals of Georgia, holding that there was no preemption of Respondents' tort claims, reversed the trial court's ruling and the Supreme Court of Georgia affirmed that decision.

## PRIOR RAISING OF FEDERAL ISSUES

Petitioner raised at each stage of the proceedings the federal question sought to be reviewed:

1) In the trial court, by way of a motion for partial summary judgment, which motion was granted. (See Appendix C.)

2) In the Court of Appeals of Georgia, in Appellee's brief. (See Appendix B for disposition.)

3) In the Supreme Court of Georgia by way of a petition for certiorari. (See Appendix A for disposition.)

## STATEMENT OF REASONS FOR GRANTING WRIT OF CERTIORARI

### I. FEDERAL LAW IN THE AREA OF REGULATION OF AIRCRAFT IN FLIGHT AND REGULATION OF NOISE AND OTHER EMISSIONS BY AIRCRAFT IN FLIGHT HAS PREEMPTED STATE AND LOCAL CONTROLS IN THESE AREAS, INCLUDING LOCAL CONTROLS IN THE FORM OF CIVIL TORT ACTIONS FOR DAMAGES.

This Court's decision in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 93 S.Ct. 1854 (1973), and its much debated Footnote 14 is central to the question presented by this petition. In Burbank, the owner-operator of the Hollywood Burbank Airport brought suit in federal court against the City of Burbank seeking to enjoin enforcement of an ordinance forbidding any "pure jet" aircraft from taking off from the airport between 11:00 p.m. of one day and 7:00 a.m. of the next, and forbidding the airport operator from permitting any such takeoffs. This Court, in affirming the grant of the injunction, held that "FAA, now in conjunction with EPA, has full control over aircraft noise, preempting state and local control." 93 S.Ct. at 1859. The Court

noted that the interdependence of factors such as safety, efficiency and noise controls requires a "uniform and exclusive" system of federal regulation "leav[ing] no room for local curfews or other local controls." 93 S.Ct. at 1862. (Emphasis added.)

"Local controls" includes controls exerted by the judicial branch of state and local government as well as the legislative branch, and includes controls in the form of tort actions for money damages. Indeed, the awarding of money damages is, and is often intended to be, a potent method for control of conduct. In San Diego Building Trades Council, etc. v. Garmon, 359 U.S. 236, 79 S.Ct. 773 (1959), a state court was held to be preempted from its power to enjoin certain picketing and to award damages for conduct which was subject to regulation by the National Labor Relations Act. This Court said:

> "Our concern is with delimiting areas of conduct which must be free from state regulation if

national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme. (Cits. omitted). It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may be true of the incidence of a particular state

injunction. To sanction either involves a conflict with federal policy in that it involves allowing two law-making sources to govern." 79 S.Ct. at 781. (Emphasis added.)

The same rationale applies to the instant case and makes Burbank dispositive. If money damages are awarded under state law theories of nuisance or trespass against the City of Atlanta for harm allegedly caused by aircraft in flight, the City will be punished for conduct which is wholly beyond its control and lies exclusively within the federal domain. If juries in fifty different states are permitted to review and assess the "reasonableness" of flight operations at airports, the flights of aircraft, and the regulation of noise, it would be impossible to attain what Congress has sought to attain - a national uniform scheme of airport noise regulation and regulation of aircraft in flight.

Although this Court clearly decided in Burbank that local control of aircraft in flight has been preempted by extensive federal regulation in the area, much controversy has been generated by the Court's expressly leaving open for later decision the question of what limits, if any, apply to the exercise of "proprietary rights" by a municipality which owns and operates an airport. In a widely debated footnote, the Court explained, in pertinent part:

> "Appellants and the Solicitor General submit that this indicates that a municipality with jurisdiction over an airport has the power to impose a curfew on the airport, notwithstanding federal responsibility in the area. But, we are concerned here not with an ordinance imposed by the City of Burbank as 'proprietor' of the airport, but with the exercise of police power. While the Hollywood Burbank Airport

may be the only major airport which is privately owned, many airports are owned by one municipality yet physically located in another. For example, the principal airport serving Cincinnati is located in Kentucky. Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor." 93 S.Ct. at 1861, fn. 14. (Emphasis added.)

The meaning of Footnote 14 has been considered often, with several courts coming to differing conclusions. The distinction drawn between police power and proprietary power by a municipal airport operator has lead some courts to the erroneous conclusion that a municipal owner-operator can

regulate activities and exercise controls which it could not as a municipality exercising its police power.

For example, National Aviation v. City of Hayward, 418 F.Supp. 417 (N.D. Cal. 1976), involved a challenge to an ordinance passed by the City of Hayward as owner-operator of the local airport, which prohibited all aircraft in excess of a fixed decibel level from landing at or taking off from the airport between the hours of 11:00 p.m. and 7:00 a.m. The court noted that the Burbank court's finding of preemption in the case of a virtually identical ordinance was made only with regard to a "non-proprietor" municipality in the exercise of its "police" powers, and thus, found itself on the horns of a "particularly sharp dilemma". 418 F.Supp. at 421. Although the court noted that giving full credence to the so-called "proprietor exception" in Footnote 14 would "severely undermine the rationale" of the Supreme Court's finding of preemption, it elected to recognize the exception:

> "...If on the other hand, we disregard the proprietor exception as dicta in order to fully effectuate the Burbank rationale, we impose upon airport proprietors the responsibility under Griggs for obtaining the requisite noise easements, yet deny them the authority to control the level of noise produced at their airports." 418 F.Supp. at 424.

The dilemma was resolved in favor of the validity of the curfew ordinance, a holding which would, indeed, "severely undermine" the rationale of Burbank.

Instead of focusing on the nature of the regulation involved, its relation to federal regulations in the area, and its effect on the national air transportation system, the court focused on the proprietor-non-proprietor distinction and came to a conclusion wholly inconsistent with Burbank. If, as this Court concluded in Burbank, a curfew interferes with the requirement

of a "uniform and exclusive" system of federal regulation in the area, it should make no difference whether the curfew is imposed under the authority of police power or proprietary power. Indeed, it might often be difficult or impossible to determine if a municipality is acting under its police power or as a proprietor. In any event, the impact of the curfew remains the same - interference with flight schedules at other airports and local fight congestion immediately before and after the hours of the curfew - thus upsetting the delicate balance struck by federal law between safety, efficiency, noise control and protection of persons in flight and on the ground.

It is important to note that the Hayward court not only incorrectly accepted the proprietor exception as overriding, but it also failed to perceive that the constitutional theory of inverse condemnation, the theory on which Griggs v. Allegheny County, 369 U.S. 84, 82 S.Ct. 531, (1972), was decided, is not inconsistent with

federal preemption in the area of flight and noise regulation. This failure largely created the court's "dilemma". The Griggs case was decided solely on the basis of the constitutional theory of inverse condemnation. State and common law claims of nuisance and trespass were not involved.

Since inverse condemnation is based upon specific federal constitutional grounds, it cannot be preempted. It merely means that the state agency (municipal airport owner/operator) which has "taken" land for airport purposes must pay for it. This does not require any regulation of aircraft flight or noise. On the other hand, if it is determined that a municipal owner/operator of an airport can be guilty of the continuing act of trespass or maintaining a nuisance for which it must respond in damages, such a determination necessarily includes a conclusion that the owner/operator has the right to control aircraft flights and noise emanating from such flights. This conclusion cannot be correct under the Burbank decision.

In Air Transportation Association of America v. Crotti, 389 F.Supp. 58 (N.D. Cal. 1975), the court developed the better solution to the meaning of Burbank and Footnote 14. In Crotti, an association of air carriers sued the managing officials of several major California airports, seeking a declaratory judgment that certain state noise regulations were invalid. The challenge involved two types of regulations - Community Noise Equivalent Level (CNEL) standards, which prescribed aircraft noise monitoring requirements aimed at achieving a future maximum noise level, and Single Event Noise Exposure Level (SENEL) standards, which were prohibitions applied to noise generated by aircraft engaged in flight. The court found the CNEL monitoring requirements to be "a passive function" which were "innocuous to aircraft traffic," not in conflict with federal regulations, and therefore, not preempted. 389 F.Supp. at 64. On the other hand, the court found that the SENEL provisions had been preempted under the rationale of Burbank. Those provisions

attempted to regulate noise levels which occur when an aircraft is in flight and, therefore, constituted a "per se unlawful exercise of police power into the exclusive federal domain of control over aircraft flights and operation, and airspace management and utilization in interstate and foreign commerce." 389 F.Supp. at 65.

The court's analysis focused on the type of activity being regulated rather than on the type of power, police versus proprietary. The CNEL regulations, since they dealt with ground noise level management through land use planning and control, were not preempted. The SENEL regulations, which sanctioned the noise levels of aircraft in flight, were preempted. Airport land and facilities use were subject to local regulation, but noise emanating from aircraft in flight was not.

Footnote 14 should not, therefore, be overemphasized. Rather, focus should center on the holding of the majority opinion in Burbank

that federal legislation and regulation leave "no room for local curfews or other local controls." Burbank, supra, 93 S.Ct. at 1862.

In summary, this Court's decision in Burbank, when considered with federal law regulating the flight of aircraft and noise and other emissions by aircraft in flight (particularly the Federal Aviation Act of 1958, 49 U.S.C. §1301 et seq., and the Noise Control Act of 1972, 42 U.S. C. §4901 et seq., and 49 U.S.C. §1431), leads to the conclusion that state and local controls in these areas have been preempted. State and common law tort actions for damages, a formidable method of exercising control, are similarly preempted. Persons who own property in the vicinity of an airport may pursue the constitutional remedy of inverse condemnation if they are able to show that aircraft landing and taking off at the airport unreasonably interefere with the use and enjoyment of their land. Inverse condemnation consistently has been held to be an available remedy, and Petitioner

makes no contention that it is not. See, Griggs v. County of Allegheny, Pa., 369 U.S. 84, 82 S.Ct. 531, (1962); United States v. Causby, et al., 328 U.S. 256, 66 S.Ct. 1062 (1946).

## II. THE FEW COURTS THROUGHOUT THE COUNTRY WHICH ALREADY HAVE STRUGGLED WITH THE QUESTION PRESENTED BY THIS PETITION HAVE ARRIVED AT CONFLICTING VIEWS OF AN AIRPORT PROPRIETOR'S LIABILITY FOR DAMAGES CAUSED BY NOISE AND OTHER EMISSIONS BY AIRCRAFT IN FLIGHT.

There are four prior cases of help in this area; three of these are factually indistinguishable from the present case. The earliest case, and decided prior to Burbank, is City of Newark v. Eastern Airlines, Inc., 159 F.Supp. 750 (D.N.J. 1958). In that case, several (non-proprietor) municipalities and individuals brought an action against various airlines serving Newark Airport for injunctive relief and damages. The plaintiffs alleged that the flight of aircraft over their property constituted a public and/or private nuisance and a trespass to realty and asked that

the defendant airlines be enjoined from flying over their property at any altitude which constituted a trespass or nuisance. 2/ With regard to the prayer for injunctive relief, the defendants urged that the Civil Aeronautics Board (CAB), and not the court, had "primary and exclusive jurisdiction" to grant the type of relief sought. The parties stipulated that the flights were conducted in conformance with CAB regulations.

The court noted that the defendant airlines were subject to "an elaborate and uniform system of regulations and control." 159 F.Supp. at 754. The airlines in Newark (like the airlines serving Atlanta Airport) were engaged in interstate air commerce under the authority of a certificate of public convenience and necessity granted by the CAB, and each airline was required to conduct all

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2/ Plaintiffs subsequently responded to the court's request for more specificity by requesting the injunction of flights at altitudes of less than 1200 feet over their properties.

of its operations in accordance with comprehensive CAB rules and regulations which prescribed in detail all aspects of aircraft operation, including the procedures to be followed in landings and departures. The court concluded that such a pervasive system of regulation clearly evidenced Congress' intent to preempt the area of regulation and control of interstate air commerce, and that uniformity of regulation was essential in order to maintain maximum standards of safety. As a result, the court held that it did not have the power to grant the injunctive relief sought by the plaintiffs and dismissed that part of the complaint. The court said:

> "An attempted amendment of the present regulations by the Court, coupled with a modification of the operations specifications, if such modification becomes necessary, would be an unwarranted interference with the regulatory power vested in the Civil Aeronautics Board and could

> result only in an unseemly conflict between the administrative agency and the court. If the courts undertook, by judicial decree, to promulgate regulations and establish flight patterns peculiarly applicable to each major airport - and there are one hundred and ninety four - the uniformity contemplated by the Civil Aeronautics Act and essential to a comprehensive regulatory system would soon be impaired. The entire development of the air transportation system would be hampered by a myriad of judicially prescribed regulations of only local application." 159 F.Supp. at 757-758.

The court concluded that the plaintiffs' remedy was to seek relief from the CAB.

The second count of the plaintiffs' complaint sought injunctive relief and damages for an alleged trespass to realty. The court held

that an action for trespass could not be maintained unless there was some evidence that the flights of the defendant airlines over the plaintiffs' property were "at altitudes below the navigable airspace and within the superadjacent reaches above the land." 159 F.Supp. at 760. The plaintiffs offered no proof that the flights complained of were within the immediate reaches of the land and below the navigable airspace which has been declared by Congress to be in the public domain. There was also no evidence presented showing that the airplanes passing over the property belonged to any of the defendant airlines. Thus, the court dismissed the claim for injunctive relief. The claim for damages was also dismissed based on the insufficiency of the evidence to support the charge of trespass to realty.

Although the court in City of Newark v. Eastern Airlines, Inc. did not speak in terms of preemption of the trespass claims, its decision is consistent with and supports Petitioner's position in this case. The Newark court recognized the

pervasiveness of federal regulation in the area of the flight of aircraft and Congress' intent to preempt the area of regulation and control of interstate air commerce. The court also noted that the "entire development of the air transportation system would be hampered by a myriad of judicially prescribed regulations of only local application." 159 F.Supp. at 758. Finally, and more importantly, the Newark court expressly concluded that flights of aircraft within the navigable airspace and in conformance with federal rules and regulations were lawful and, thus, could not be the basis for a trespass action.

More recently, in Luedtke v. County of Milwaukee, 521 F.2d 387 (7th Cir. 1974), a post-Burbank case, property owners filed suit for damages against the County of Milwaukee, as owner and operator of General Mitchell Field, and five federally certified airlines which utilized the airport facilities, alleging, as Respondents do here, damages caused by aircraft flying at low altitudes over their property and the resulting

noise, vibration and fumes. The property owners, in addition to alleging an unconstitutional taking of their property without just compensation, based their claim on state law negligence and nuisance theories of recovery. The court acknowledged the property owner's right to seek relief in the form of an inverse condemnation action, but, relying on Burbank, rejected the property owners' claims for injunctive relief and tort damages. The court held that "relief in the form of judicially-made rules and regulations to govern the airport and airline operations at Mitchell Field was not available to the plaintiffs." 521 F.2d at 390. The court also noted that this Court had held in Washington v. General Motors Corp., 406 U.S. 109, 92 S.Ct. 1396 (1972), that Congress also had preempted the area of regulation of aircraft emissions. In conclusion, the court said:

> "Since the federal laws and regulations have preempted local control of aircraft flights, Burbank, supra,

the defendants may not, to the extent they comply with such federal laws and regulations, be charged with negligence or creating a nuisance. Similarly, §114.04 of the Wisconsin Statutes cannot be invoked to make unlawful flights which are in accordance with federal laws and regulations. If, as the plaintiffs allege, the aircraft flights have resulted in the 'taking' of their property, the plaintiffs have actions at law to recover just compensation from the County. (Cits. omitted)...." 521 F.2d at 391.

Another case, also indistinguishable in its facts from the instant case, is San Diego Unified Port District v. Britt, et al., 67 Cal. App. 3d 361, 136 Cal. Rptr. 557 (1977), cert. denied, 434 U.S. 859, 98 S.Ct. 184 (1977), where a group of homeowners in the vicinity of the San Diego Airport brought suit against the San Diego Port

District for damages allegedly caused by the noise and noxious by-products of aircraft flying in and out of the airport over their property. The homeowners based their damage claims on the common law theories of nuisance, trespass and negligence, as well as the constitutional theory of inverse condemnation. In a very thorough and well reasoned opinion, the court relied on Burbank and arrived at the decision that the airport operator could not be held liable under the common law or state law theories of nuisance, trespass or negligence for tort damages arising from aircraft in flight because of federal law preemption in the area of regulation of aircraft in flight and the regulation of noxious by-products of aircraft in flight. The court recognized that to authorize recovery from an airport proprietor for such damages would "permit local liability for conduct within exclusive federal control." 136 Ca. Rptr. at 566. The court found that state and local control by the judicial branch of government, in the form of litigation of state and common law

theories of nuisance, negligence and trespass, was every bit as preempted as state and local legislative control, as was involved in Burbank. In conclusion, the court said:

> "It is no rebuttal to this reality to argue that the Port District could reduce or avoid its tort liability by selectively or entirely excluding aircraft from Lindbergh Field. Such regulations to avoid tort liability would have the same deleterious effect on interstate air traffic flow as the Burbank ordinance. In our view, civil damages for the noxious by-products of aircraft in flight, ..., are a form of state regulation in an area which must remain free of such regulation if national air safety, traffic and noise policy are to be left unhampered.

> Plaintiffs have not alleged that the flying aircraft about which they complain did not comply with federal law and regulations. Since federal laws and regulations have preempted local control of aircraft in flight, flights which comply with such laws and regulations may not be classified as negligent, nuisances or trespasses, and the Port District cannot be held liable for tort damages alleged to arise from them...." 136 Cal. Rptr. at 566-567. (Emphasis added.)

Thus, the plaintiffs' remedy was to pursue their constitutional action sounding in inverse condemnation.

The most recent case and the one which has generated the most controversy is Greater Westchester Homeowners Association v. City of Los Angeles, 26 Cal. 3d 86, 160 Cal. Rptr. 733 (1979), cert. denied, 446 U.S. 933 (1980), a case factually consistent

with the instant case, but in irreconcilable conflict with Burbank, Britt and Luedtke. In that case, a large number of property owners brought an action against the City of Los Angeles for damages allegedly caused by the flight of aircraft over or near their property to and from Los Angeles International Airport. The trial of the inverse condemnation claims and the nuisance claims was bifurcated; and following a trial on the inverse condemnation phase of the case, substantial judgments were entered in favor of the plaintiffs and fully satisfied by the city. The nuisance phase of the case was tried before the court without a jury and resulted in a finding that the noise created by jet aircraft using the two north runways of the airport was a nuisance. The plaintiffs were, thus, awarded damages independently of the inverse condemnation awards. The city then appealed to the Supreme Court of California the trial court's award of nuisance damages.

The California Supreme Court first discussed briefly general law on preemption and looked to

see whether there was a compelling federal interest which would preclude state imposition of nuisance liability upon the airport proprietor. The court examined the Federal Aviation Act of 1958, as amended, 49 U.S.C.A. §1301, et seq., noted the extensive federal supervision of the location, layout, design, construction and environmental compatibility of airport facilites, and recognized that the federal government was also involved in aircraft noise control. It then discussed this Court's decision in Burbank and noted the proprietary distinction in Footnote 14. Although acknowledging that there was no agreement in previous cases as to the scope of the so-called proprietor exception, the court concluded:

> "...The foregoing authorities recognized that a property owner has an inverse condemnation remedy, constitutionally founded, against the proprietor of an airport for property damage or loss caused by noise

generated at the facility. We discern no reason either in law or policy why the common law and statutory remedy of nuisance as defined above should not under similar circumstances equally protect the person of the owner or the occupant." (Emphasis in original.) 160 Cal. Rptr. at 738.

The nuisance claims, therefore, were found not to be preempted.

Curiously, the Greater Westchester court acknowledged the conclusion reached in Britt, supra, that federal regulation of aviation and aircraft noise preempted the proprietor's control of aircraft in flight, and yet, admitting this, reached a conclusion in considerable tension with the rationale and holding of Britt and Burbank. The court also recognized Luedtke, supra, and its holding, but made no effort to distinguish it. Thus, the court in Greater Westchester simply cited, then ignored, the two decisions which had previously dealt with the tort liability issue.

The decisions of the Supreme Court of Georgia and of the Georgia Court of Appeals in the instant case suffer from the same infirmity.

In Greater Westchester, the California court concluded that if actions under the theory of inverse condemnation were allowed, then so should actions under the nuisance theory. However, as pointed out in the concurring opinion, the court's reliance on inverse condemnation cases to support recovery under common law tort theories is a "fundamental weakness." 160 Cal. Rptr. at 742 (concurring opinion). What the court evidently did not recognize is that the question of preemption is not an issue in inverse condemnation actions, since "federal regulations cannot preempt constitutionally protected rights." 160 Cal. Rptr. at 742 (concurring opinion).

The California Supreme Court in Greater Westchester, and the Georgia Supreme Court and Court of Appeals by relying on Greater

Westchester, ignored the rationale of Burbank and the principle of Garmon, supra, that the imposition of damages is a form of regulation. Moreover, they seemingly ignored the United States Court of Appeals decision in Luedtke, supra. Their decisions, in essence, will permit trial courts, on an ad hoc basis, to intrude upon a preempted area by using their power to award money damages to regulate aircraft flight operations for noise abatement purposes. This is clearly contrary to the holding in Burbank that Congress intended a uniform approach to such problems.

## III. IT IS NOT INCONSISTENT TO HOLD THAT CIVIL TORT ACTIONS FOR DAMAGES ARE PREEMPTED AND ACTIONS FOR DAMAGES UNDER INVERSE CONDEMNATION ARE NOT.

The Georgia courts, like the California court in Greater Westchester, failed to focus on the reason why a plaintiff could be entitled to recover for inverse condemnation and not be entitled to recover for personal injury on theories of nuisance or trespass. The question as stated

itself is wrong -- i.e., if a party can recover from an airport operator for property damages why can he also not recover for personal injury? This question misses the point made in Britt and Luedtke: constitutional claims cannot be preempted. Under Griggs, supra, and other inverse condemnation cases, the plaintiff recovers "just compensation" for the taking of an air easement over his property.

In determining just compensation, courts, including this Court in Griggs, have taken account of the use to which the plaintiff puts his property (normally as a residence) and the loss of use that results from the taking. In virtually all of these cases there have been allegations of injury to the health and persons of those who live in the affected residence, and presumably this has been taken into account in determining the just compensation. Moreover, when it is determined by a court that a "taking" has occurred and that just compensation must be paid, the airport operator is granted in return an "air easement" which allows

it to carry on the very same operations which are alleged to constitute a continuing nuisance or a trespass. The airport operator cannot be required to pay just compensation for an air easement, based upon loss of use of the property, and then be required to pay continuing damages for the very operations for which it has obtained an easement.

There is no inconsistency in a finding that tort actions for damages based on the nuisance and trespass theories of recovery are preempted while actions brought under the theory of inverse condemnation are not. Recovery for damages caused by the flight of aircraft under inverse condemnation is based on specific, federal constitutional grounds and, thus, cannot be preempted. The Constitution of the United States, like the Constitution of the State of Georgia, specifically provides that private property shall not be taken for public purposes without just compensation. Thus, if the interference and damage caused by the flight of aircraft over land reaches the level of a "taking", the airport proprietor is bound to pay

the owner just compensation for that "taking". Griggs v. Allegheny County, 369 U.S. 84, 82 S.Ct. 531 (1972). The airport proprietor, in essence, obtains an air easement from the affected property owner which allows it to carry on the offending activity - the property owner has been paid for the burden imposed on his property.

In addition, the type of proof required in an inverse condemnation action and a common law claim founded in nuisance are significantly different. In inverse condemnation, the "reasonableness" of the government's actions are not at issue; in fact, allegations of negligence are "surplusage" and unnecessary. City of Atlanta v. Kenny, 83 Ga. App. 823, 64 S.E. 2d 912. The actions of the defendant may be otherwise completely lawful and even reasonable but still be such an interference with a plaintiff's property so as to cause a diminution in the value of the property and, thus, a taking. On the other hand, a nuisance claim, of necessity, requires an adjudication of the reasonableness of the defendant's

actions. In fact, under Georgia law, the plaintiff must show that "[t]he defect or degree of misfeasance must be to such a degree as would exceed the concept of mere negligence." City of Bowman v. Gunnells, 243 Ga. 809, 811, 256 S.E. 2d 782, 784 (1979).

This difference in the elements of the two theories is critical. Because an inverse condemnation action against an airport proprietor merely requires an adjudication that the activity of aircraft over the plaintiff's property has resulted in a diminution of the market value of the property, such an action does not require adjudication or regulation of the flight of aircraft over the property. Indeed, it assumes that the flights will continue to occur. It only means that the airport proprietor must pay for the land which it has "taken" for airport purposes (i.e., an "avigation" or "flight" easement). An action for damages under the theory of nuisance however, necessarily requires a determination that the airport proprietor has acted unreasonably, and

it includes a conclusion that the airport proprietor or the court can exert control over aircraft flights and noise emanating from such flights. Such an action for damages assumes the offending conduct can and should be regulated or stopped. The regulation is accomplished through the imposition of money damages.

## CONCLUSION

This Court in Burbank, supra, clearly stated that federal legislation and regulation in the area of aircraft in flight and the regulation of noise and other emissions by aircraft in flight "leave no room for local curfews or other local controls." Burbank, supra, at 639. (Emphasis added.) As recognized by this Court in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773 (1959), local controls include controls exerted by the judiciary in the form of

awards of money damages in tort actions.

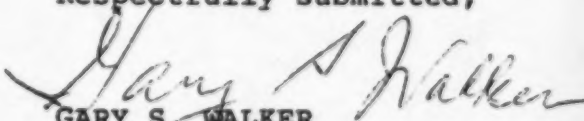
There is no question that a uniform and exclusive system of regulation of aircraft in flight is necessary to insure maximum safety and efficiency on a national level, and there should be no question that it is important to have the area free from state regulation. Therefore, state regulation, be it in the form of an injunction or in the form of money damages, is an impermissible intrusion into an area subject to an exclusive federal regulatory scheme.

The Supreme Court of Georgia, in holding that airport proprietors could be subject to actions based on nuisance and trespass theories of recovery, as well as inverse condemnation, misconstrued and misapplied the important rationale and holding of this Court in Burbank, supra. The decision will allow trial courts in Georgia to intrude into an area which has been declared to be preempted and to use their power to award money damages to regulate airport operations

for noise abatement purposes. The decision will require an adjudication in the trial courts of the reasonableness of flight operations. Such impermissible regulation will have a disruptive effect on the air transportation system, not only at Atlanta Airport but at airports throughout the country.

For the above-stated reasons, Petitioner City of Atlanta respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Georgia.

Respectfully submitted,



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# Appendix

APPENDIX A

OPINION OF THE SUPREME COURT OF GEORGIA

In the Supreme Court of Georgia

Decided: October 14, 1981

37360. CITY OF ATLANTA v. OWEN et al.

PER CURIAM.

We granted certiorari to consider whether the respondents' action for damages based upon Code Ann. §§11-101 and 72-101 et seq., "arising '[a]s a direct and proximate result of the operation of the airport facility,' and the routing of flights over [respondents'] property," has been preempted by federal regulation of aircraft flights. The Court of Appeals held that there was no preemption. Owen v. City of Atlanta, 157 Ga. App. 354 ( SE2d ) (1981). Our review of the Court of Appeals opinion and the authorities cited therein leads this court to the same conclusion. See also Wood v. City of Huntsville, 384 So2d 1081 (Ala. 1980); Smart v. City of Los Angeles, 112 Cal. App. 232 (16 Cal Rptr. 174) (1980); 49

U.S.C.A. §1506. Accordingly, the judgment is affirmed.

We stress that our holding is a narrow one. "All the trial judge held in the instant case was that, under the Supreme Court's decision in City of Burbank and other federal decisions, appellants' claims were preempted by federal regulation. All we are called upon to decide is whether that ruling was erroneous. We [hold] that it was and that appellants' right of action is not barred by the doctrine of preemption." Owen v. City of Atlanta, supra, at 357-358.

Judgment affirmed. Jordan, Hill, Marshall, Clarke, Smith, Gregory concur.

APPENDIX B

OPINION OF THE COURT OF APPEALS OF GEORGIA

60976. OWEN et al. v. CITY OF ATLANTA

CARLEY, Judge.

Appellants are homeowners and residents living in close proximity to William B. Hartsfield Atlanta International Airport, a public airport facility owned, maintained and operated by the appellee-City of Atlanta. Appellants brought suit against the appellee in a multi-count complaint, alleging claims for inverse condemnation, nuisance and unlawful trespass arising "[a]s a direct and proximate result of the operation of the airport facility" and the routing of flights over their property. The appellee, conceding that appellants had stated a claim for inverse condemnation, moved for summary judgment as to the nuisance and unlawful trespass counts. The trial judge, relying in large part upon City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (36 L.ed.2d 547, 93 S.C. 1854)(1973), held that appellants' nuisance and trespass claims were

preempted by federal regulation of aircraft flights. Appellants appeal, urging that their claims have not been preempted by federal regulation.

The doctrine of preemption by federal regulation was first stated in Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (13 L.E. 996) (1851) in which the Supreme Court of the United States held: "Whatever subjects of this power [to regulate commerce] are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of a nature as to require exclusive legislation by Congress." Cooley, 53 U.S. at 319, supra. The doctrine of preemption has been followed consistently since 1851 and has resulted in the ousting of the states from concomitant regulation of a field of commerce subject to federal regulation if there are "persuasive reasons" therefor "- either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakenly so ordained. [Cit.]" Florida &c.

Avacado Growers v. Paul, 373 U.S. 132, 142 (83 S.C. 1210, 10 L.Ed.2d 248) (1963). It was against this background of legal precedent and doctrine that the Supreme Court decided City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, supra. The relevant facts in that case are simply stated: The City Council of Burbank had adopted a noise-abatement ordinance making it unlawful for jet aircraft to take off from the Hollywood-Burbank Airport, a privately owned facility, between the hours of 11 p.m. and 7 a.m. The owner-operator of the airport brought suit to enjoin enforcement of the ordinance. The Supreme Court found that the ordinance, which had been adopted by the city in the exercise of its police power rather than as the proprietor of the airport, was unconstitutional under the supremacy clause. "It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption." City of Burbank, 411 U.S. at 633, supra. However, the Court noted the limited scope of its holding. "[W]e are concerned

here not with an ordinance imposed by the City of Burbank as 'proprietor' of the airport, but with the exercise of police power ... We do not consider here what limits, if any, apply to a municipality as a proprietor." City of Burbank, 411 U.S. at 635, fn. 14, supra. Pretermitting this limitation on the scope of the holding in City of Burbank enunciated by the Court itself, that decision has been cited as authority for the proposition that "[s]ince the federal laws and regulations have preempted local control of aircraft flights, [cit.], the [proprietor of the airport and the airport and the airlines servicing it] may not, to the extent they comply with such federal laws and regulations, be charged with negligence or creating a nuisance." Luedtke v. County of Milwaukee, 521 F.2d 387, 391 (7th Cir. 1975). Other courts, however, noting the careful distinction drawn by the Supreme Court in City of Burbank between proprietary duties and police power regulation and that "Congress apparently intended to preserve the principle of substantial proprietary

control over airport planning, design, and use," have held that an airport proprietor may be amenable to suit for the consequences of its land use planning decisions and improper use and maintenance of its ground facilities. Greater Westchester Homeowners Assn. v. City of Los Angeles, 160 Cal. Rptr. 733, 738 (Cal. S.C. 1979), cert. denied ___ U.S. ___ (100 S.C. 2149, 64 L.E.2d 786) (1980). In this case we are called upon to decide whether appellants' claims have been preempted by federal regulation of aircraft flights.

We find that appellants' claims have not been preempted. As we interpret City of Burbank, that decision merely stands for the proposition that a non-proprietor municipality, acting under its police power, may not regulate the timing of aircraft landings. A non-proprietor may not exercise its police power in contravention of federal regulation in the same area. City of Burbank does not, however, stand for the proposition that federal regulation has ousted a proprietor from the exercise of all proprietary control over its

own facility. As have several other courts, we construe footnote 14 of the City of Burbank decision as recognizing that the proprietor has the power to impose airport use restrictions where such restrictions are reasonable and non-discriminatory. See generally British Airways Bd. v. Port Authority of N. Y., 564 F.2d 1002 (2d Cir. 1977); British Airways Bd. v. Port Authority of N. Y., 558 F.2d 75 (2d Cir. 1977); National Aviation v. City of Hayward, 418 F.Supp. 417 (N.D. Calif. 1976). Furthermore, there is apparent agreement even among courts that adhere to a more restrictive interpretation of City of Burbank that, at the very least, proprietary control over management of ground facilities has not been federally preempted. See generally San Diego Unified Port Dist. v. Superior Ct., 135 Cal. Rptr. 557 (Cal. App. 1977); Air Transport Assn. of America v. Crotti, 389 F.Supp. 58 (N.D. Cal. 1975). Preemption is, in our opinion, a doctrine which ousts a state or other government from the exercise of its police power in an area in which the

power of the federal government is, by law or by implication, preeminent. Florida &c. Avocado Growers, 373 U.S. at 141, 142, supra. It is not a doctrine which invests an airport proprietor with impenetrable immunity from such liability as may arise from that proprietorship. Neither is preemption a doctrine behind which an airport proprietor whose facility creates a "nuisance" may hide, urging that its hands are tied because federal regulation has preempted all matters dealing with aircraft flights. "Nothing contained in this Chapter [the Federal Aviation Program] shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Chapter are in addition to such remedies." 49 U.S.C.A. §1506. The proprietor of an airport must bear its rightful share of the legal liability for all the damage and loss resulting from and occasioned by its facility.

Such has always been the analysis of this issue in Georgia. "While the right to regulate and control the flight of airplanes in interstate

commerce is vested in the Federal Government under the Commerce Clause of the Federal Constitution, the Federal Government cannot invade the rights of the people of the sovereign states so as to regulate them as between themselves. This governmental function and power has not been granted to the Federal Government. On the contrary it is reserved in the states by the tenth amendment. Accordingly,..., the fact that the location and altitude of landing operations is subject to Federal control does not in any manner determine whether the rights of a surface owner have been violated by such flights. Such an owner has a remedy against the person, corporation or agency responsible for the invasion. This petition alleges that responsibility to be in the defendant who controls the airport facilities, and must be taken as true ... The defendant here is a governing authority, and if it appears that the expanded use to which it puts its airport invades the property rights of adjacent owners, it has the same remedies for curing the situation, by condemnation or

otherwise, as exist where it chooses a location in the first instance and locates an airport thereon. The layout of the field may be entirely proper from the standpoint of air safety and air traffic regulations, and may still constitute a nuisance as to a property owner contiguous thereto if the end result is to compel, authorize, or acquiesce in flights over such owner's home at altitudes of 50 to 100 feet which result in special damage to him." Chronister v. City of Atlanta, 99 Ga. App. 447, 452-453 (108 S.E.2d 731) (1959). We do not believe, for the reasons discussed above, that the subsequent decision by the Supreme Court in City of Burbank on the issue of federal preemption destroys the viability of Chronister and other Georgia decisions predating City of Burbank as authority for the proposition that an action predicated upon a nuisance theory may be brought against the proprietor of an airport facility. "The ... authorities recognize that a property owner has an inverse condemnation remedy, constitutionally founded, against the proprietor of an

airport for property damage or loss caused by noise generated at the facility. We discern no reason either in law or policy why the common law and statutory remedy of nuisance...should not under similar circumstances equally protect the person of the owner or the occupant." Greater Westchester, 160 Cal. Rptr. at 738, supra. It follows, therefore, that the grant of partial summary judgment to the appellee on the theory that appellants' claims other than for inverse condemnation were barred by federal preemption must be reversed.

We would emphasize that in so holding we do not express any opinion on the merits of appellants' claim under Code Ann. §72-101 et seq. All the trial judge held in the instant case was that, under the Supreme Court's decision in City of Burbank and other federal decision, appellants' claims were preempted by federal regulation. All we are called upon to decide is whether that ruling was erroneous. We have held that it was and that appellants' right of action is not barred

by the doctrine of preemption. Whether appellants are entitled to recover damages under applicable Georgia law is an issue which obviously must be resolved at a later date. "If ... the airplanes, following the traffic patterns and maintaining the altitudes prescribed by the Federal regulatory agency, have no alternative but to invade the plaintiff's property in such manner as to constitute nuisance, then this defendant, by maintaining an airport of which such invasion is an unavoidable incident, is itself maintaining the nuisance and may be held liable in damages... [T]he regulation promulgated by the [federal regulatory agency] as to flight altitudes 'does not determine the rights of the surface owner, either as to trespass or nuisance.'" Chronister, 99 Ga. App. at 452, supra.

Judgement reversed. Quillian, C.J., and Shulman, P.J., concur.

APPENDIX C

ORDER OF SUPERIOR COURT OF FULTON COUNTY

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

| | | |
|---|---|---|
| WES OWEN, et al., Plaintiffs | ) | |
| vs. | ) | CIVIL ACTION FILE NO. C-31533 |
| CITY OF ATLANTA, Defendant | ) | |
| JOE MOSES, et al., Plaintiffs | ) | |
| vs. | ) | CIVIL ACTION FILE NO. C-31534 |
| CITY OF ATLANTA, Defendant | ) | |
| AVIS CRUTHFIELD, et al., Plaintiffs, | ) | |
| vs. | ) | CIVIL ACTION FILE NO. C-31535 |
| CITY OF ATLANTA, Defendant | ) | |

## O R D E R

The Motion for Partial Summary Judgment, filed by the defendant, having come on regularly to be heard and having heard argument of counsel and having read and considered briefs and the entire record, the Court enters the following ORDER:

1. The Plaintiffs here are homeowners and residents of College Park, Georgia, who live within a close proximity to the runways and taxiways of the Atlanta Airport.

The complaint alleges in Count I that aircraft making their approaches to the airport pass over the property of the plaintiffs approximately sixty per cent of the time, thus constantly invading and trespassing upon the airspace of the plaintiffs. The plaintiffs charge that the noise, smoke, raw fuel, and noxious odors emitted by the low-flying aircraft severely and substantially interfere with the residential use and beneficial enjoyment of ownership of the plaintiffs' property.

Count II of the complaint alleges that said emissions have caused a serious detrimental effect upon the lives and health of the plaintiffs and their families.

Count III alleges that said flights interfere with the use of the plaintiffs' property for residential purposes and constitute a trespass upon the plaintiffs' property.

Count IV alleges that the plaintiffs have suffered physical damages to their property caused by vibrations, air pressure waves, and corrosive pollutants.

2. The defendant, City of Atlanta, has moved for partial summary judgment on the ground that no genuine issues of material fact exist as to the plaintiffs' claims based upon nuisance and trespass from over-flight of aircraft.

The plaintiffs rely upon the recent case of Greater Westchester Homeowner's Ass'n. v. City of Los Angeles, 160 Cal. Rptr. 733 (1979). This case held that a municipality which owns and operates an airport is liable on a nuisance theory for per-

sonal injuries sustained by nearby residents caused by noise from aircraft using the facility.

The Supreme Court of the United States in City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, considered a local ordinance which prohibited jet aircraft from taking off from the airport between the hours of 11:00 p.m. and 7:00 a.m. Mr. Justice Douglas writing for the Court, held that the Federal Aviation Act and Noise Control Act had pre-empted state and local control over aircraft noise. Federal Aviation Act of 1958, 49 U.S.C.A. §1301 et seq.; Noise Control Act of 1972, 86 Stat. 1234. The Noise Control Act, by definition, includes the sonic boom.

The U.S. Court of Appeals for the Seventh Circuit in Luedtke v. County of Milwaukee, 521 F.2d 387 (1975), noted that in the area of aircraft emissions, Congress had also preempted the field. Washington v. General Motors Corp., 406 U.S. 109 (1972); Virginians for Dulles v. Volpe, 344 F.Supp. 573 (E.D. Va. 1972). The Court in Luedtke concluded:

> Since the federal laws and regulations have pre-empted local control of aircraft flights, Burbank, supra, the defendants may not, to the extent they comply with federal laws and regulations, be charged with negligence or creating a nuisance. Id. at 391.

In Luedtke, as in the case at bar, the plaintiff sought damages for operation of a nuisance.

The California Supreme Court in Greater Westchester, supra, made no effort to distinguish Luedtke, and attempted to distinguish Burbank, supra on the ground that it "refrained from imposing similar limitations on the rights and obligations of a proprietor-landlord to control aircraft noise levels."

Nor did the court in Greater Westchester overrule San Diego Unified Port District v. Superior Court of the County of San Diego and Roger A. Britt, et al., 67 Cal. Rptr. 557 (1977), cert. den., 434 U.S. 1310 (1978). In San Diego, a group of homeowners brought an action based on nuisance, trespass and negligence for recovery of damages caused by aircraft flying to and from the airport. Relying upon Luedtke, the court said:

". . . In our view, civil damages for the noxious by-products of aircraft in flight . . ., are a form of state regulation in an area which must remain free of such regulation if national air safety, traffic and noise policy are to be left unhampered . . . . We conclude that plaintiffs may not recover tort damages for harm caused by aircraft in flight.

While these cases are not controlling, the Court finds their logic compelling. To allow tort damages for nuisance and trespass, as alleged in the complaint would be to hold municipalities liable for the consequences of acts over which control has been pre-empted by the federal government.

As was pointed out by Mr. Justice Jackson in Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 303:

> Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway, it is caught up in an elaborate and detailed system of controls.

The Supreme Court in Burbank concluded by recognizing that "fractionalized control of the

timing of takeoffs and landings would severly limit the flexibility of the FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded." Burbank, supra, at 1862.

Finally, the Court notes that the Georgia cases 1/ that have addressed the issue of the liability of airports under theories of nuisance or trespass had been decided before the development of the pre-emption doctrine in this area.

3. For the above reasons, the Motion for Partial Summary Judgment, filed by the defendant, is hereby granted, and judgment entered in favor of the defendant as to Counts II, III, and IV of the complaint.

Let it be so ORDERED.

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1/ Thrasher v. Atlanta, 178 Ga. 514; Delta Air Corp. v. Kersey, 193 Ga. 862; Scott v. Dudley, 214 Ga. 565; Dyer v. Atlanta; 219 Ga. 538; City of Atlanta v. Donald, 221 Ga. 135; Chronister v. Atlanta, 99 Ga. App. 447.

This 28th day of MARCH, 1980.

S/ JOEL J. FRYER
JUDGE, FULTON SUPERIOR COURT, A.J.C.

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APPENDIX D

FEDERAL AVIATION ACT OF 1958
49 U.S.C. §1301 et seq.

Provisions involved:

49 U.S.C. §1304

> "There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right to freedom of transit through the navigable airspace of the United States."

49 U.S.C. §1348

> "(a) The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.
>
> * * *
>
> (c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water

vehicles, and between aircraft and airborne objects."

49 U.S.C. §1431

"(a) For purposes of this section:

(1) The term 'FAA' means Administrator of the Federal Aviation Administration.

(2) The term 'EPA' means the Administrator of the Environmental Protection Agency.

(b)(1) In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title. No exemption with respect to any standard or regulation under this section may be granted under any provision of this Act unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted.

(2) The FAA shall not issue an original type certificate under section 1423(a) of this title for any aircraft for which

substantial noise abatement can be achieved by prescribing standards and regulations in accordance with this section, unless he shall have prescribed standards and regulations in accordance with this section which apply to such aircraft and which protect the public from aircraft noise and sonic boom, consistent with the considerations listed in subsection (d) of this section.

(c)(1) Not earlier than the date of submission of the report required by section 4906 of Title 42, EPA shall submit to the FAA proposed regulations to provide such control and abatement of aircraft noise and sonic boom (including control and abatement through the exercise of any of the FAA's regulatory authority over air commerce or transportation or over aircraft or airport operations) as EPA determines is necessary to protect the public health and welfare. The FAA shall consider such proposed regulations submitted by EPA under this paragraph and shall, within thirty days of the date of its submission to the FAA, publish the proposed regulations in a notice of proposed rulemaking. Within sixty days after such publication, the FAA shall commence a hearing at which interested persons shall be afforded an opportunity for oral (as well as written) presentations of data, views, and arguments. Within ninety (90) days after the conclusion of such hearing and after consultation with the EPA, the FAA shall -

(A) in accordance with subsection (b), prescribe regulations (i) substantially as they were submitted by EPA, or (ii) which are a modification of the proposed regulations submitted by EPA, or

(B) publish in the Federal Register a notice that it is not prescribing any regulation in response to EPA's sub-

mission of proposed regulations, together with a detailed explanation providing reasons for the decision not to prescribe such regulations and a detailed analysis of and response to all documentation or other information submitted by the Environmental Protection Agency with such proposed regulations.

(2) If EPA has reason to believe that the FAA's action with respect to a regulation proposed by EPA under paragraph (1)(A)(ii) or (1)(B) of this subsection does not protect the public health and welfare from aircraft noise or sonic boom, consistent with the considerations listed in subsection (d) of this section, EPA shall consult with the FAA and may request the FAA to review, and report to EPA on, the advisability of prescribing the regulation originally proposed by EPA. Any such request shall be published in the Federal Register and shall include a detailed statement of the information on which it is based. The FAA shall complete the review requested and shall report to EPA within such time as EPA specifies in the request, but such time specified may not be less than ninety days from the date the request was made. The FAA's report shall be accompanied by a detailed statement of the FAA's findings and the reasons for the FAA's conclusions; shall identify any statement filed pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969 with respect to such action of the FAA under paragraph (1) of this subsection; and shall specify whether (and where) such statements are available for public inspection. The FAA's report shall be published in the Federal Register, except in a case in which EPA's request proposed specific action to be taken by the FAA, and the FAA's report indicates such action will be taken.

(3) If, in the case of a matter described in paragraph (2) of this subsection with respect to which no statement is required to be filed under such section 4332(2)(c) of Title 42, the report of the FAA indicated that the proposed regulation originally submitted by EPA should not be made, then EPA may request the FAA to file a supplemental report, which shall be published in the Federal Register within such a period as EPA may specify (but such time specified shall not be less than ninety days from the date the request was made), and which shall contain a comparison of (A) the environmental effects (including those which cannot be avoided) of the action actually taken by the FAA in response to EPA's proposed regulations, and (B) EPA's proposed regulations.

(d) In prescribing and amending standards and regulations under this section, the FAA shall -

(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this Act and Chapter 23 of this title;

(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

(3) consider whether any proposed standard or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;

(4) consider whether any proposed standard or regulation is economi-

cally reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

(5) consider the extent to which such standard or regulation will contribute to carrying out the purposes of this section.

(3) In any action to amend, modify, suspend, or revoke a certificate in which violation of aircraft noise or sonic boom standards or regulations is at issue, the certificate holder shall have the same notice and appeal rights as are contained in section 1429 of this title and in any appeal to the National Transportation Safety Board, the Board may amend, modify, or reverse the order of the FAA if it finds that control or abatement of aircraft noise or sonic boom and the public health and welfare do not require the affirmation of such order, or that such order is not consistent with safety in air commerce or air transportation.

# APPENDIX E

NOISE CONTROL ACT OF 1972
42 U.S.C. §4906 et seq., 49 U.S.C. §1431

Provisions involved:

42 U.S.C. §4906

"The Administrator, after consultation with appropriate Federal, State, and local agencies and interested persons, shall conduct a study of the (1) adequacy of Federal Aviation Administration flight and operational noise controls; (2) adequacy of noise emission standards on new and existing aircraft, together with recommendations on the retrofitting and phaseout of existing aircraft; (3) implications of identifying and achieving levels of cumulative noise exposure around airports; and (4) additional measures available to airport operators and local governments to control aircraft noise. He shall report on such study to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committees on Commerce and Public Works of the Senate within nine months after October 27, 1972."

49 U.S.C. §1431

"(a) for purposes of this section:

(1) The term 'FAA' means Administrator of the Federal Aviation Administration.

(2) The term 'EPA' means the Administrator of the Environmental Protection Agency.

(b)(1) In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title. No exemption with respect to any standard or regulation under this section may be granted under any provision of this Act unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted."

## APPENDIX F

## LIST OF NAMES OF ALL PARTIES

Petitioner:

City of Atlanta

Respondents:

Wes Owen, J. T. Broughton, W. E. Ehrensperger, E. O. Sauls, Birdie M. Jolly, D. B. Cottongim, K. C. Timmons, William W. Crider, Jesse A. Dent, Jr., J. W. Webster, J. W. Nolan, Barbara Fortenberry, D. E. Ruch, M. C. Cochran, A. A. Abt, Frank M. Hughes, Carl Allen Diehl, Thomas L. Brown, Ralph E. Frost, W. B. West, J. E. Jones, M. D. Nolan, J. M. Smallwood, J. P. Ashmore, M. E. Mays, W. P. Rose, Annie Oakley, Clem Nobblitt, Jane White, L. B. Lewis, Doyle Stroup, C. C. Sandusky, A. M. Rhett, R. S. Abernathy, J. T. Keys, H. C. Kelley, C. R. Cowart, Thomas M. Pate, Wm. E. Langford, Robert C. Elliott, James Long, J. Y. Dodson, Jack Dawson, Herman Spohn, Mrs. Charles T. Steele, James W. Hiett, E. W. Ellerbee, J. H. Ross, T. E. Golly, G. P. Patmore, W. J. Corn, S. C. Reeves, Howard Legg, M. H. Phillips, Early Morris, M. C. Screws, A. C. McCord, P. D. Mulkey, Gwen G. Staples, H. D. Hughey, Robert W. Johnson, C. T. Brimer, Pauline Bonapfel, J. B. Cook, D. L. Morrow, Lawson T. Bell, Jr., John Barron, W. E. Mation, M. P. Oglesby, Gerald Bryan, D. A. Butler, Julius G. May, A. N. Porter, Wm. C. Loudermilk, Warren J. Hayes, W. David Williford, Drexel D. Hoffman, Robert L. Adams, Warren D. Sterns, A. A. Brieske, Douglas W. Moyle, Rene E. Dziejowski, Roland T. Scales, Bulah B. Smith, Vivian & J. A. Clements, R. T. Tuttle, L. B. Henderson, Robert O. Schreer, Wayne W. Garretson, V. L. Adams, G. P. Jones, Bob Srvin, J. C. White, Jr., G. W. Guest, K. A. Rooks, Miguel Montesinos,

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## CERTIFICATE OF SERVICE

This is to certify that the undersigned counsel of record for Petitioner City of Atlanta has served three copies of Petition for Writ of Certiorari to the Supreme Court of the State of Georgia on counsel for Respondents by depositing same in the United States mail with first class postage prepaid and addressed as follows:

Gene Burkett, Esquire
P. O. Box 531
Conyers, Georgia 30207

This the 6th day of January, 1982.

Gary S. Walker

GARY S. WALKER
Counsel of Record for
Petitioner City of Atlanta

# Opposition

NO. 81-1372

Supreme Court, U.S.
FILED
APR 7 1982
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

CITY OF ATLANTA, a municipal corporation,
Petitioner,

VS.

WES OWEN, et al.;
JOE MOSES, et. al.; and
AVIS CRUTCHFIELD, et. al.,
Respondents.

---

# RESPONSE IN OPPOSITION TO

# PETITIONER'S BRIEF IN CERTIORARI

---

GENE BURKETT
Counsel of Record for
Respondents
1185 Green Street
P.O. Box 531
Conyers, Georgia 30207

IN THE SUPREME COURT OF THE UNITED STATES

CITY OF ATLANTA, a municipal corporation,
Petitioner,

VS. CASE NO. 81-1372

WES OWEN, et. al.;
JOE MOSES, et. al.; and
AVIS CRUTCHFIELD, et. al.,
Respondents.

ENTRY OF APPEARANCE

Comes now GENE BURKETT and enters his appearance as counsel of record for Respondents.

Respectfully submitted,

GENE BURKETT

Counsel of Record for
Respondents

IN THE SUPREME COURT OF THE UNITED STATES

CITY OF ATLANTA,
a municipal corporation
Petitioner in Certiorari,

VS. CASE NO. 81-1372

WES OWEN, et. al.,
JOE MOSES, et. al.,
AVIS CRUTCHFIELD, et. al.,
Respondents in Certiorari.

## RESPONSE IN OPPOSITION TO PETITIONER'S BRIEF IN CERTIORARI

### I. FEDERAL LAWS AND REGULATIONS CLEARLY INDICATE THAT STATE AND LOCAL CONTROL OF NOISE AND ITS AFFECT ON CITIZENS HAS NOT BEEN PREEMPTED.

On January 19, 1981, the Department of Transportation, Federal Aviation Administration, adopted a regulation known as AIRPORT NOISE COMPATIBILITY PLANNING (Federal Aviation Regulations, PART 150, Published in 46 FR 8316, January 26, 1981) which became effective February 28, 1981. Significant portions of that regulation

have been copied and lodged with the Clerk of this Court.

This regulation clearly and concisely deals with the issue now pending before this Court, to-wit: Federal preemption vs. owner/operator responsibility for airport noise. On page 7, see attached, the regulation declares the following relevant facts:

> "The FAA has required reduction of aircraft noise at the source through certification, modification of engines, or replacement of aircraft; it regulates flight procedures for noise abatement purposes, and provides assistance to

airport operators and community representatives in development of airport noise control and land use compatibility programs. Airport proprietors are responsible for taking the lead in local aviation noise control."
(Emphasis added)

Then on page 8 of the regulation, we find:

"Although many elements are involved, the prime responsibility under the ASNA Act for developing a program designated to reduce the exposure

of individuals to noise in the vicinity of a particular airport lies with the airport operators ... The ASNA Act requires the Secretary to prescribe standardized methods of measuring noise and noise exposure at airports, and to identify the land uses which are normally compatible with various noise exposures. It does not preempt, but reinforces the appropriate exercise of local authority and responsibility for airport noise abatement and land use planning, zoning, or the exercise of related

police powers."

(Emphasis supplied)

The regulation goes on to say that the Federal Government has preempted certain areas such as air space use, air traffic control and management. It nevertheless says that there remains a critical role for state and local authorities in protecting their citizens from unwanted aircraft noise, primarily through their powers of land use control. In addition, the regulation goes on to cite several Federal Court decisions concerning preemption and aircraft noise. The regulation points out another important factor, relied on by the Plaintiffs, on page 10, wherein it reiterates the holding of various courts that an airport

proprietor has the ability to control the type of aircraft used at its airport as well as the right to impose curfews or other use restrictions. These rights may be exercised by the proprietor so long as they do not violate certain constitutional restrictions concerning discrimination and interestate commerce.

In recent years, the Congress has taken a number of other steps to assist airport proprietors in reducing airport noise. Since 1970, the Airport and Airway Development Act, 49 U.S.C. 1701 et seq., has provided federal funding for airport development, including "any acquisition of land or of any interest therein necessary to insure that such land is used only for purposes which are

compatible with the noise levels of the operation of a public airport." 49 U.S.C. 1711(3)(C). In the Airline Deregulation Act of 1978, Congress specifically preserved "the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certified by the [Civil Aeronautics] Board to exercise its proprietary powers and rights." 49 U.S.C. (Supp. 11) 1305(b)(1). The Petitioner is well aware of this regulation; and, has in fact participated in this program by acquiring approximately 400 houses in the community of Mt. View, which lies on the opposite ends of the runways where respondents

reside.

Finally, in the Aviation Safety and Noise Abatement Act of 1979, Pub. L. No. 96-193, 94 Stat. 50, 49 U.S.C. 2101 et seq., a new mechanism was created whereby airport proprietors who have submitted an aircraft noise reduction plan to the Secretary of Transportation may also adopt a number of measures to reduce airport noise, including the implementation of a preferential runway system, use restriction by type or class of aircraft, construction of acoustical noise barriers and, to the extent approved by the Administrator of the FAA, "the use of flight procedures to control the operation of aircraft to reduce exposure of individuals to noise in the area surrounding

the airport." 49 U.S.C. 2104. Surely, these explicit statutory measures, which were intended to assist and encourage airport proprietors in their noise control efforts, demonstrate that there is no merit to the City's assertion that it is unable to control airport noise effectively because of total federal preemption.

Thus, the shield which the City of Atlanta has raised to avoid liability, namely: the federal government through the FAA, has itself indicated that it is the City's prime responsibility to take appropriate action to reduce the noise effect on the adjacent residents. Accordingly, and as common sense would also dictate, the City has

the responsibility for protecting the citizens from the adverse effects created by the operation of the airport. And, it cannot hide behind some fabricated scheme or idea that their hands are tied by the Federal Government.

## II. THE COURT DECISIONS WHICH HAVE ADDRESSED THIS ISSUE HAVE NOT ERODED RESPONSIBILTY OF THE OWNER OPERATOR OF AN AIRPORT FACILITY TO RESIDENTS LIVING ADJACENT TO AIRPORTS.

The case of Greater Westchester Homeowners Association v. City of Los Angeles deals on "all fours" with the case at bar. That case, in which certiorari was denied by this Court, dealt with the same issues which are now being raised by the City of Atlanta. In that case, just as with the Court of Appeals of Georgia decision, in this case, fully and coherently deal with the "smoke screen" which is constantly raised by owner/operators of airport facilities. Respondent respectfully urges the Court to direct its attention to the decision

in the WESTCHESTER CASE as well as the brief of the United States of America filed in that case.

Contrary to Petitioners attempt, the decision of City of Newark v. Eastern Airlines, Inc., 159 F. Supp. 750 (D.N.J. 1958), sheds no light on the case at bar. It merely recited what has been held to be the law in Georgia and other jurisdictions for several years, to-wit: Airlines using an airport cannot be held responsible in damages to residents living adjacent to airport runways. That was the sole issue in the NEWARK case; and, it clearly has no similarity to the instant case. Responsdents do not take any position in opposition to the NEWARK decision. Basically the rationale

in that decision was that the CIVIL AERONAUTICS BOARD prescribes such air traffic rules and regulations as may be necessary to control aircraft flight in public air space, and the airlines are obligated to comply with such rules, and therefore not liable.

The NEWARK case suffers from the same infirmities as the preponderance of the cases offered by Petitioner. That is to say, that this case, nor others cited, does not deal specifically with the instant question, which is: Can a proprietor-operator of an airport facility be held accountable in damages to nearby residents? Once again, the Newark case does not contemplate a municipality-owner, but it deals with the air-

line operators who use the facility themselves.

Also relied upon by Petition is the case of LUEDTKE V. COUNTY OF MILWAUKEE, 521 F. 2d 387 (1975), a post-BURBANK case. It is difficult to intelligibly address the holding in LUEDTKE. However, in an amicus curiae brief submitted by the United States, at the request of this Court, in the case of City of Los Angeles v. Greater Westchester Homeowners Association, No: 79-1406, Wade H. McCree, Jr. wrote:

> "In Luedtke v. County of Milwaukee, 521 F. 2d 387(1975), the Seventh Circuit had previously rejected plaintiffs' contention that the General

Mitchell Airport constituted a nuiance becuase of the manner in which it was operated. After a truncated analysis of the issue, the Seventh Circuit held that because "federal laws and regulations have preempted local control of aircraft flights," compliance with those laws and regulations is a full defense to a charge of nuisance. Luedtke, supra, 521 F.2d at 391. While the Seventh Circuit cited this Court's decision in Burbank in support of its holding, that court did not carefully examine Burbank (See 411 U.S

at 635-636 n.14), and did not attempt to reconcile its disposition of the nuisance claim with its holding that under Griggs, supra, the landowners had a valid cause of action for inverse condemnation against the airport proprietor. Luedtke, supra, 521 F 2d at 391. The federal noise policy that was recognized in Burbank, supra 411 U.S. at 635-636 n.14, does not allow for "local control of aircraft flights" and, to that extent, the Seventh Circuit was correct. However, that court failed to

recognize the broad arsenal of powers otherwise available to proprietors, which have been purposefully reserved to them because of their special ability to deal with local problems, and the Court failed to recognize that the misues or failure to use such powers could result in tort liability. In any event, the Seventh Circuit's decision has not been followed by other federal courts and does not represent clear or significant conflict with the opionion below." 1/

---

1/ A copy of the amicus curiae brief submitted in the case of GREATER WESTCHESTER V. CITY OF LOS ANGELES has been lodged with the Clerk of this Court.

While Petitioner quotes exhaustively from BRITT (SAN DIEGO UNIFIED PORT DISTRICT VS. SUPERIOR COURT FOR THE COUNTY OF SAN DIEGO AND ROGER A. BRITT, et al 67 Cal Rptr 557, 1975), it actually is of little help in resolving the issue. The Court of Appeal for the Fourth Appellate District, Div. One, issued the opinion. Dictum in the Britt decision says that "federal pre-emption" bars airport tort liability for injuries caused by airborne jet aircraft. The Britt decision was ill-advised, ill-conceived and ill-considered. it is based on a mis-reading of federal law at all levels - legislative, administrative and judicial. It has brought confusion into this field of the law, and

merits disapproval.

The prime reason for the Britt-caused confusion, however, is substantive. The Britt opinion proceeds from an erroneous premise. It presumes (contrary to Federal law) that airport operators cannot control aircraft noise. The opinion is based on the following syllogistic reasoning:

> If one cannot control jet aircraft noise, he cannot be liable for its injurious effects (67 Cal. App. 3d at 376);
>
> airport operators cannot control jet aircraft noise because of "federal pre-emption" (67 Cal. App. 3d at 376-377);

> Therefore, airport operators are not liable for injuries caused by jet aircraft noise (67 Cal. App. 3d at 376-377).

However the minor premise in the Britt syllogism is wrong. The Federal government has not "preempted" all control. Sufficient control has been reposed in airport operators to curb the insulting by-products of the jet age, as has been previously argued. Having failed or refused to exercise such control, liability follows. Such liability is the intent of Congress. In British Airways Bd. v. Port Authority of New York, 558 F. 2d 75 (2d Cir. 1977)(Kaufman, C.J.), the

Second Circuit cogently explained the limited preemption principle that applies in the field of aircraft noise control. There, the operators of the Concorde supersonic transport sued the proprietor of John F. Kennedy Airport to overturn an airport ban that prevented the Concorde from serving New York in a 16-month demonstration experiment that the Secretary of Transportation had authorized. The district court found that the federal government had preempted the proprietor from banning the aircraft through its authorization of the demonstration flights. The Second Circuit reversed, holding that Congress had "provided for the promulgation by airport proprietors of reasonable regulations

to establish acceptable noise levels for the airfield and its environs." British Airways Bd., supra, 558 F. 2d at 78. To our knowledge, no federal court has repudiated or disagreed with this holding.

## III CONCLUSION

Petitioner's thrust is, and has been, based simply upon the doctrine, or "a" doctrine, of pervasive federal preemption in the realm of airport noise control. Petitioner would like for this Court to ratify its position so that it can continue to hide behind the "skirt tails" of federal color. To allow this to happen would not only be a travesty but also giant step backwards in bringing airport-noise impact problems under reasonable control. It is obvious that the problem is well out of hand under the present system of responsibility, i.e., joint efforts by owners and FAA. Indeed, the prognosis would be totally hopeless if this Court should say,

in effect, "O.K., owner you have no responsibility to your citizens living adjacent to your airport, the federal agency will take care of them."

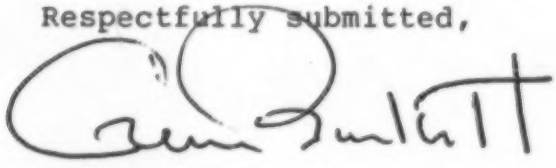
Petitioner would have this Court believe that the parameters involved in creating an airport noise impact problem are simple as one two. One, noise ratings of the jets themselves. Two, the flight patterns and scheduling. Then, Petitioner would show that these factors are within the specific control of the FAA and, ipso facto, how can Petitioner be held accountable. Indeed, the problem is not nearly so simple. It is clear that it was Petitioner who made the decision and undertook the courses of action that put

Respondents in their current predicaments. Petitioner has at its disposal, with the support of decisions from this Court and various federal laws and regulations, the means by which the impact upon the adjacent residents can be lessened. And, Petitioner has at its disposal the means and powers to relocate and totally remedy the noise impact upon the residents. To say that its hands are tied is not only legal absurdity, but, in fact, a joke.

Respondents respectfully submit that the federal laws and regulations now in effect; the Court rulings which have addressed the issue; and, common sense and decency tells us that the owner-operator of an

airport must and should be held accountable to the nearby residents for the impact the operation of the airport has upon them. Accordingly, the decision of the the Supreme Court of Georgia should stand and certiorari to Petitioner should be denied.

Respectfully submitted,



GENE BURKETT

## CERTIFICATE OF SERVICE

This is to certify that the undersigned counsel of record for Respondents has served three copies of Response in Opposition to Petitioner's Brief in Certiorari to the Supreme Court of the United States on counsel for Petitioner by depositing same in the United States mail with first class postage prepaid and addressed as follows:

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This 20 day of April, 1982.

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Counsel of Record
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# Amicus Brief

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 81-1372

IN THE

# Supreme Court of the United States

October Term, 1981

CITY OF ATLANTA, a municipal corporation,

*Petitioner,*

*vs.*

WES OWEN, *et al.;* JOE MOSES, *et al.;* and AVIS CRUTCHFIELD, *et al.;*

*Respondents.*

## BRIEF OF AMICUS CURIAE CITY OF LOS ANGELES.

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No. 81-1372

IN THE

# Supreme Court of the United States

October Term, 1981

CITY OF ATLANTA, a municipal corporation,

*Petitioner,*

*vs.*

WES OWEN, *et al.;* JOE MOSES, *et al.;* and AVIS CRUTCHFIELD, *et al.;*

*Respondents.*

## BRIEF OF AMICUS CURIAE CITY OF LOS ANGELES.

Pursuant to Supreme Court Rule 36, the City of Los Angeles, California, hereby submits this brief *amicus curiae* in support of the City of Atlanta's Petition for Writ of Certiorari. Counsel for all parties have consented to the filing of this brief as reflected by letters contained in Appendix A.

### Introduction.

Your *amicus curiae*, City of Los Angeles, by and through its Board or Airport Commissioners, owns and operates Los Angeles International Airport (LAX), the third busiest, publicly owned commercial airport in the world. LAX serves approximately 35 million passengers a year and accommodates every major domestic air carrier as well as numerous foreign air carriers.

The City of Atlanta has petitioned this Court for a Writ of Certiorari seeking review of a decision of the Georgia Supreme Court in *Owen v. City of Atlanta*. In that case, the Supreme Court held that the City of Atlanta, as proprietor of Hartsfield Atlanta International Airport, was subject to state tort liability because residents in the vicinity of the airport were allegedly injured by noise emanating from aircraft using its airport.

In *Greater Westchester Homeowners Association v. City of Los Angeles*, 26 Cal.3d 86, 160 Cal.Rptr. 733 (1979) *cert. denied*, 446 U.S. 933 (1980), a case almost identical to *Owen v. City of Atlanta*, your *amicus curiae* urged this Court to resolve the conflict between the California Supreme Court in *Greater Westchester* and the United States Court of Appeals in *Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975). At that time, Los Angeles' Petition was supported in *amicus curiae* briefs filed by four other California commercial airports: San Diego International Airport-Lindberg Field, John Wayne Airport, Burbank-Glendale-Pasadena Airport and San Francisco International Airport. Los Angeles urged in its earlier Petition that:

> "The result of *Greater Westchester* is a decision which will frustrate the congressionally declared federal policy of a uniform regulatory scheme for airport noise control. It will permit trial courts, on an *ad hoc* basis, to intrude in a preempted area by using their power to award money damages to regulate airport operations for noise abatement purposes. In short, the Courts will be regulating airports, airlines and the airline transportation system under the guise of awarding damages."

No longer can it be asserted that this problem is isolated to the peculiar proclivities of California tort law. Fomented by *Greater Westchester*, the State of Georgia has aligned

itself with California. This Court is urged to act to prevent the further crumbling of a uniform national transportation system.

**Federal Regulation of Aircraft Noise Is Pervasive.**

Federal regulation of airspace and air commerce is authorized under the Federal Aviation Act of 1958 (1958 Act)[1] which entrusted certain powers to the Federal Aviation Administration (FAA) and the Civil Aeronautics Board (CAB). The CAB's authority was, and still is, primarily concerned with the economic aspects of the aviation/airline industry.[2] The FAA's responsibility pursuant to the 1958 Act, primarily through the promulgation of Federal Aviation Regulations (FARs), was to promote air safety, regulate the use of the navigable airspace, establish air navigation facilities, operate a national system of air traffic control,[3] and certify airmen, airplanes and certain airports for commercial use.[4] This exclusive federal control was bottomed upon Congress' finding that the public had a basic right to air transit.[5] Moreover, the power to ensure such travel was declared to be a right of national sovereignty.[6]

While the 1958 Act seemingly granted the FAA responsibility for all aspects of aviation, it did not specifically authorize the FAA to establish limits on aircraft noise emissions or otherwise regulate for noise abatement pur-

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[1]49 U.S.C. §§ 1301-1542 (1970). The Act, as amended, is the basic law of the land relative to federal aviation regulation.

[2]For the CAB's area of responsibility, see 49 U.S.C. §§ 1302, 1321-1387 (1970).

[3]49 U.S.C. § 1348 (1970).

[4]*Id.* at § 1421-1432.

[5]*Id.* at § 1304.

[6]*Id.* at § 1508(a). "The United States of America is declared to possess and exercise exclusive national sovereignty in the air space of the United States . . ." *Id.*

poses.[7] In 1968, however, Congress by adopting the Federal Aviation Act Amendments of 1968, added a new provision, Section 611, to the 1958 Act.[8] This section recognized that a noise problem existed and authorized the FAA to take appropriate steps toward the control of noise. The FAA was mandated to prescribe standards for the measurement of aircraft noise, and to establish regulations necessary to control and abate aircraft noise. The grant of authority was limited, however. Such standards and regulations had to be "consistent with the highest degree of safety" and "economically reasonable, technologically practicable, and appropriate for the particular type of *aircraft*."[9] Thus, the resulting regulations to control noise were directed at the source of noise—the aircraft itself—rather than at airports or their proprietors.

In 1969, the FAA promulgated FAR Part 36[10] in response to Section 611. FAR Part 36 was the embodiment of the FAA's desire to control aircraft noise at its source. It provided a mechanism by which aircraft noise could be uniformly measured. It also established maximum allowable noise levels (depending on weight and number of engines) that aircraft of *new* design could not exceed in order to receive type certification.[11] FAR Part 36 did not address

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[7]Although the FAA, in accordance with 49 U.S.C. § 1423(c), could certify aircraft as "airworthy," the certification had to be based on safety considerations, not noise.

[8]Federal Aviation Act Amendments of 1968, Pub. L. No. 90-411, § 611, 49 U.S.C. § 1431 (1976).

[9]49 U.S.C. § 1431(b)(1) (1976). (Emphasis added).

[10]34 Fed. Reg. 18,364 (1969).

[11]For an aircraft to fly, it must first be type certificated. The Administrator of the FAA is vested with the power to issue type certificates for aircraft. 49 U.S.C. § 1423 (1976). Type certificates have to do with the design of an aircraft. Once a general design is type certificated, all other aircraft built according to that design are entitled to type certificates. *Morton v. Dow*, 525 F.2d 1302 (1975).

possible changes in flight procedures that might reduce noise nor did it apply to the then currently operating aircraft.[12] The adoption of Part 36 required new airplane types to be markedly quieter than the generation of turbojets developed in the late 1950's and early 1960's.

Since 1969, FAR Part 36 has been amended several times, expanding its coverage from only newly-designed domestic subsonic jet aircraft to *all* jet powered and propeller driven aircraft. The 1973 amendment increased significantly the number of aircraft subject to FAR Part 36 by extending the standards to newly manufactured domestic subsonic aircraft of *older* design.[13]

On December 17, 1976, the FAA tackled the most controversial aspect of controlling aircraft noise at its source and required currently operating domestic subsonic aircraft with maximum gross weights over 75,000 pounds to meet FAR Part 36 standards.[14] Whether by retrofitting or otherwise, all operating aircraft were required to comply with the FAR Part 36 standards on or before January 1, 1985. This was to be accomplished through a phased compliance program for all operating aircraft.[15] However, effective February 1, 1981, the compliance dates were extended for some

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[12]FAA Noise Standards: Aircraft Type and Airworthiness Certification, 14 C.F.R. Part 36 (1980). 34 Fed. Reg. 18,364 (1969).

[13]38 Fed. Reg. 29,569 (1973).

[14]It was controversial primarily because of the potential economic impact on the airline industry of being required to retrofit (acoustically modify by applying sound absorbent material), reengine or replace noncomplying aircraft, 41 Fed. Reg. 56,049 (1976). For example, in 1976, the FAA estimated that modification of all affected aircraft would cost close to one billion dollars. *Id.* at 56,052.

[15]This was effectuated by amending FAR Part 91 and adding a new Subpart E. The FAA was concerned because, as of the effective date of the amendment, only 500 (about one-fourth) of the U.S. fleet of 2100 jet aircraft complied with FAR Part 36. 41 Fed. Reg. 56,046 (1976).

aircraft types of January 1, 1988.[16] Further, FAR Part 36 was made applicable to foreign as well as domestic aircraft.[17]

In 1972, Congress, apparently dissatisfied with the progress of the FAA's noise abatement efforts, passed the Noise Control Act of 1972 (the 1972 Act).[18] Among other things, the 1972 Act amended Section 611 which had been added to the 1958 Act in 1968. In essence, the 1972 Act prohibited the FAA from issuing an original type certificate to any aircraft that failed to meet FAR Part 36 noise standards.[19] The 1972 Act, which recognized a role for local governments, added the Environmental Protection Agency (EPA) to the regulatory process and required both the FAA and EPA to consider the effect of aircraft noise and sonic boom on the public health and welfare. While the FAA maintained regulatory authority over aircraft noise, it was mandated to hold public hearings on EPA proposed aircraft noise regulations. The FAA, however, was not required to adopt them. As a result, the EPA has had a meager influence in

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[16]These include certain two-engine or three-engine aircraft under FAA approved replacement plans and certain two-engine aircraft under the small communities exemption provisions. 45 Fed. Reg. 79,302 at 79,313 (1980).

[17]49 Fed. Reg. 79,302 at 79306-79310 (1980).

[18]Pub. L. No. 92-574, 86 Stat. 1234, (codified at 42 U.S.C. § 4901-4918 and 49 U.S.C. § 1431) (1976). Actually the Act addressed much more than aircraft noise. Among other things it mandated the EPA to set noise standards for all products in interstate and foreign commerce.

[19]49 U.S.C. § 1431. In other words, the Act directed the FAA to apply Part 36 standards to all newly produced aircraft even though aircraft of that type were already in operation, as opposed to those merely on the drawing boards. Aircraft that do not comply with Part 36 standards as originally promulgated in 1969 include: All 707 and DC-8s; depending on engine type, most 737, DC-9, and BAC 1-11s; some 727s; and a few 747s. All DC-10 and L-1011 aircraft comply. See U.S. Department of Transportation/Federal Aviation Administration, Aviation Noise Abatement Policy (1976), 36.

the regulatory process—nearly all EPA proposals have been rejected.[20]

Partially to speed up FAA response to EPA proposals, Congress further amended Section 611 in the Quiet Communities Act of 1978.[21] It specified a 90 day time limit for FAA response to EPA-suggested regulations for noise abatement. It further required the FAA to provide the public (in the *Federal Register*) with a detailed analysis and response to the EPA proposals.

In 1979, Congress continued its march toward pervasiveness and enacted the Aviation Safety and Noise Abatement Act of 1979 (ASNA).[22] ASNA required the Secretary of Transportation to establish federal standards for measuring and assessing noise as it impacts residents near airports.[23] Additionally, airport proprietors were made eligible under the Airport and Airways Development Act to obtain

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[20]For example, on August 29, 1975, the EPA proposed two amendments to the Federal Aviation Regulations which would have required pilots of all civil turbojet-powered aircraft to utilize a two-segment approach to the landing runway. Generally, a two-segment approach procedure would require the pilot to fly an initial steep glide path segment (six degrees) and to intercept the conventional glide path (three degrees) at 700 feet altitude above the elevation of the airport. This procedure was to be used under certain circumstances during clear weather and when approaching a runway that had an FAA approved two-segment Instrument Landing System (ILS) approach procedure. Both proposals were rejected for safety reasons. 41 Fed. Reg. 52,388 (1976).

[21]Pub. L. No. 95-609, §§ 1-2, 4-5, 92 Stat. 3079, 3081 (codified at 42 U.S.C.A. §§ 4901, 4905, 4910, 4913 (1979)). Note that it took the FAA fifteen months to reject the EPA suggested two-segment approach procedures. *See* note 20, *supra*.

[22]Pub. L. No. 96-193, 94 State 50 (codified at 49 U.S.C. §§ 1348, 1359, 1472, 1512, 1711, 1713-1717, 1731, 1742, 2101-2108, 2121-2125) (Supp. 1980)).

[23]*Id.* at § 2102. EPNdB was the standard used by the FAA to *measure* aircraft noise. Congress wanted the FAA to establish a standard for *assessing* the impact of that noise on the community. *See* also 49 Fed. Reg. 79302 (1980).

federal funds to assist them in airport noise compatibility *planning*.[24]

In the midst of this sea of legislation, the FAA announced its interpretation of Congressional intent in the area of aviation noise abatement with its Aviation Noise Abatement Policy of 1976.[25] In essence, in the FAA's view, single liability for noise damages resides in the airport proprietor but "shared responsibility" for aviation noise abatement resides jointly among the federal, state and local governments, air carriers, airport proprietors and citizens. Taking into account the entire breadth of the legislative history regarding aviation noise law, the FAA postulated a "legal framework" that is best stated in its own words:

> 1. The federal government has preempted the areas of airspace use and management, air traffic control, safety and the regulation of aircraft noise at its source. The federal government also has substantial power to influence airport development through its administration of the Airport and Airway Development Program.
>
> 2. Other powers and authorities to control airport noise rest with the airport proprietor—including the power to select an airport site, acquire land, assure compatible land use, and control airport design, scheduling and operations—subject only to Constitutional prohibitions against creation of an undue burden on interstate and foreign commerce, unjust discrimination, and interference with exclusive federal regulatory responsibilities over safety and airspace management.
>
> 3. State and local governments may protect their

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[24]49 U.S.C. § 2103. The regulation promulgated to implement ASNA (14 C.F.R. Part 150) defines incompatible uses in general to include mobile homes, churches, schools, concert halls, residential properties and libraries. 46 Fed. Reg. 8,316 (1981).

[25]U.S. Department of Transportation/Federal Aviation Administration, *Aviation Noise Abatement Policy* (1976), 31-34.

citizens through land use controls and other police power measures not affecting aircraft operations. In addition, to the extent they are airport proprietors, they have the powers described in paragraph 2.[26]

To soothe the burden of these proprietary powers, the FAA declared that it would support local airport proprietor actions to abate noise; however, it reserved the right to block the implementation of such actions under the supremacy or commerce clauses of the Constitution. The FAA's Aviation Noise Abatement Policy and its "legal framework" asserts an extensive FAA review, but, importantly, without federal liability. The result is a piecemeal approach by local airport proprietors to mend a nationwide aircraft noise problem, thereby fragmenting Congressional efforts to adopt a uniform national approach. Thus, exclusive airport proprietor liability exists in the midst of pervasive federal control of aircraft flight operations even though Congress intended that the federal government take a more positive lead in achieving nationwide abatement of aviation noise.

**If Airport Proprietors Are Held Responsible for The Award of Tort Damages, They Will Be Forced to Adopt Noise Abatement Rules and Regulations Which Will Conflict With Congressional Intent to Establish a Uniform National Policy to Control Aircraft Noise.**

Atlanta's petition ably discusses the major decisions interpreting the previously discussed legislation and regulations. Your *amicus curiae* has gleaned from it the following:

1. Airport proprietors must pay for any "constitutional taking" of property caused by noise from aircraft utilizing their facilities. *Griggs v. Allegheny County*, 369 U.S. 84, 82 S.Ct. 531 (1972).

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[26] *Id.* at 34.

2. Non-airport proprietors are peempted by federal law from controlling aircraft noise. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). However, some non-airport proprietors may have a minor role in this area. *Air Transport Association of America v. Crotti*, 389 F.Supp. 58 (N.D. Cal. 1975).

3. A noise regulation by the airport proprietor of Hayward Air Terminal (a relatively small airport) which prohibits all aircraft which exceed a certain noise level from landing or taking off between 11:00 p.m. and 7:00 a.m. is only an incidental burden on interstate commerce. *National Aviation v. City of Hayward*, 418 F.Supp. 417 (N.D. Cal. 1976).

4. A split of authority exists as to whether airport proprietors are responsible for tort damages attributable to aircraft noise. *Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975); *San Diego Unified Port District v. Britt*, 67 Cal.App.3d 361, 136 Cal.Rptr. 557, *cert. denied*, 434 U.S. 859 (1977) and *Greater Westchester Homeowners Association v. City of Los Angeles*, 26 Cal.3d 86, 160 Cal.Rptr. 733 (1979), *cert. denied*, 446 U.S. 933 (1980).[27]

The FAA and California Supreme Court in *Greater Westchester* suggest that one way airport proprietors can limit aircraft noise liability is through the adoption of aircraft noise regulations. The variations are limitless (nighttime curfews, regulation of runway use and flight paths, restric-

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[27]*See* U.S. CONST., art. I, § 8. *See also* Noise Policy, *supra* note 25, at 58, in which the FAA discusses its review procedure of airport proprietor use restrictions.

tion of the noisest aircraft, *etc.*).[28] Petitioner is not unmindful of the progeny of *Burbank* which recognize the power of an airport proprietor to impose reasonable and nondiscriminatory airport use restrictions which do not create an unreasonable burden on interstate commerce.[29] To this end, Petitioner has instituted, after consultation with the FAA as suggested in the Aviation Noise Abatement Policy,[30] a number of noise abatement procedures. How-

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[28]U.S. Department of Transportation/Federal Aviation Administration, *Aviation Noise Abatement Policy* (1976), 31-34. *See* also H. R. Rep. No. 594, 94th Cong., 2d Sess. 14, *reprinted in* [1976] U.S. CODE CONG & AD. NEWS 1600, 1603.

> "In addition, aircraft noise has resulted in curfews and other operational constraints which have restricted the use of existing facilities, and have caused problems relating to the safety of the system. Because of noise emanating from the operations at airports, full utilization and expansion of airports to accommodate current and future traffic have been hampered." *Id.*

[29]However, no federal decision has actually sanctioned a specific use restriction when contested at a commercial airport. See *British Airways Board v. Port Authority of New York*, etc., 564 F.2d 1002 (1977); and *British Airways Board v. Port Authority of New York*, 588 F.2d 75 (1977).

[30]As stated by the FAA in its Aviation Noise Policy at 58-59:

> "While the airport proprietor is best situated to judge the local noise problem and to determine how to respond to it, he is not always in the best position to judge the impact of his noise reduction proposal on the national and international air transportation systems. Because of the intricacy of those systems, use restrictions at a single airport could, under certain circumstances, cause wide-spread disruption throughout those systems. Pursuant to the general federal interest in the free flow of interstate and foreign commerce, the constitutional principle that states and local entities may not impose undue burdens even where Congress or federal agencies have not acted, and the specific FAA responsibility for regulating the air navigation system, the federal government has the obligation to assure that airport proprietor actions to meet local needs do not conflict with national and international purposes. The proprietor's obligations to refrain from imposing an undue burden on interstate or foreign commerce or discriminating unjustly, and to avoid potential conflicts with the FAA's control of airspace and air traffic, are not difficult to articulate as matters of principle but very difficult to apply to a given factual situation.
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> * * *
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> "For these reasons, all airport proprietors servicing scheduled air carriers should apprise the Federal Aviation Administration or of their proposal to impose an airport use restriction."

ever, these noise abatement procedures were not promulgated from a litigation posture with the primary intent of limiting liability. They were drafted in coordination with the FAA with a view towards maintaining "the highest degree of safety" and limiting adverse environmental impacts.

Other airport proprietors in California have endeavored to impose airport use restrictions. However, the FAA has not always been pleased with these attempts. For example, in *Santa Monica Airport Association v. City of Santa Monica*, 481 F.Supp. 927 (C. D. Cal. 1979) (*affirmed* at 659 F.2d 100 (9th Cir. 1981), Judge Hill, over the objections of the FAA, upheld the adoption of a maximum single event noise exposure level of 100 db for aircraft using Santa Monica Airport.[31] Thus looming on the horizon for airport proprietors is the fear that the noise restrictions they adopt will not be sanctioned by the FAA. By the same token, at least in California, airport proprietors may be penalized for not adopting noise restrictions which are opposed by the FAA.

In a recent small claims case heard in South San Francisco Municipal court, for example, a judge awarded 150 residents $750.00 each because they were annoyed by aircraft noise. Most troubling is Judge Duncan's reasons for awarding the damages; he appeared particularly disturbed that the airport proprietor had neither adopted a limited curfew nor prohibited the noisiest aircraft.[32]

Judge Hill is not the only one who is on the "horns of a particularly sharp dilemma".[33] Should the airport propri-

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[31]See Brief of the United States of America, *Amicus Curiae, Santa Monica Airport Assn. v. City of Santa Monica*, Civ. No. 77-2852-H.

[32]See Appendix B.

[33]*National Aviation v. Hayward*, 418 F.Supp. 417 at 424 (1976).

etor take the initiative and impose strict noise regulations and risk being second-guessed by the FAA, or do something in between and be second-guessed by a judge or jury? The airport proprietor must walk a fine line.

By their very nature, local airport proprietors, while attempting to minimize nuisance liability, would be forced to bow to parochial rather than the more important national interests. Indeed, the Burbank Court was appropriately concerned with the possibility of these parochial interests limiting the flexibility of the FAA. The Court stated:

> "If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of the FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded. In 1960 the FAA rejected a proposed restriction on jet operations at Los Angeles Airport between 10:00 p.m. and 7:00 a.m. because such restrictions could 'create critically serious problems to all air transportation patterns.' 25 Fed. Reg. 1764-1765." 411 U.S. at 639.

*Burbank* is a clear expression by this Court that in order to ensure a uniform approach, Congress has delegated to the FAA and other federal agencies the power to regulate the air transportation industry in order to solve the aircraft noise problem. Clearly, non-airport proprietors may not so regulate. The *Owen* decision ignores the rationale of *Burbank* and the principle of Garmon[34] that the imposition of damages is a form of regulation. Moreover, *Owen* totally

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[34] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

ignores the rationale of the United States Court of Appeals decision in *Leudtke*.

The precepts of *Burbank*, calling for a uniform and exclusive system of federal regulation, are best served by the approach taken in *Leudtke*: a state's nuisance statute cannot be used to make flights unlawful which are in accordance with federal laws and regulations. *Owen* exacerbates, rather than solves, the aircraft noise problem. It will foster diversity rather than uniformity and divisiveness rather than cooperation. This is not the remedy Justice Douglas was searching for in *Burbank*[35].

**Conclusion.**

The *Owen v. City of Atlanta* decision misinterprets the relevant case law and impermissibly extends *Griggs v. Allegheny County* by holding that, in addition to inverse condemnation liability, airport proprietors will now also be liable (on a continuing basis) under state tort law for personal harm caused by the operation of aircraft in flight and suffered by persons residing in the vicinity of an airport.

The *Owen* opinion fails to address and understand the existing legal and institutional scheme of airport and aircraft noise regulation. The decision will frustrate the congressionally declared federal policy of a uniform regulatory scheme for airport noise control. It will permit trial courts, on an *ad hoc* basis, to intrude in a preempted area by using their power to award money damages to regulate airport operations for noise abatement purposes. In short, the courts will be regulating airports, airlines and the airline transportation system under the guise of awarding damages.

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[35] "What the ultimate remedy may be for aircraft noise which plagues many communities and tens of thousands of people is not known." 411 U.S. 624 at 638.

For the above-stated reasons, your *amicus curiae* respectfully requests this Court to grant the requested Petition for Certiorari.

Respectfully submitted,

IRA REINER,
City Attorney,
JAMES H. PEARSON,
Senior Assistant City Attorney,
JOHN M. WERLICH,
Assistant City Attorney,
*Attorneys for Petitioner,*
*City of Los Angeles.*

# Appendix

## APPENDIX A.

[Letterhead, Office of City Attorney]

February 2, 1982

Gene Burkett
Attorney at Law
P. O. Box 531
Congers, Georgia 30207

Re: City of Atlanta v. Wes Owen, et al.; Joe Moses, et al.; and Avis Crutchfield, et al.

Dear Mr. Burkett:

This letter will confirm our telephone conversation of February 2, 1982, and your consent to the filing of an amicus curiae brief by the City of Los Angeles in the above-referenced matter. You also agreed to send a consenting letter to the City of Los Angeles immediately due to the time constraints involved.

Thank you for your consideration in this matter.

Very truly yours,

IRA REINER, City Attorney
By /s/ James H. Pearson
James H. Pearson
Senior Assistant City Attorney

JHP:jp

[Letterhead, City of Atlanta]

February 2, 1982

James H. Pearson, Esq.
Senior Assistant City Attorney
City of Los Angeles
1 World Way
Los Angeles, California 90009

Re: City of Atlanta vs. Owen, et al.
U.S. Supreme Court No. 81-1372

Dear Mr. Pearson:

This is to confirm in writing that the City of Atlanta consents to Los Angeles' submitting an *amicus curiae* brief to the United States Supreme Court in the above-referenced action.

Very truly yours,

/s/ Irmina Rivero Owens
Irmina Rivero Owens
Associate City Attorney

## APPENDIX B.

**Residents Win $750 Each in S.F. Jet Noise Case.**

*By Bill Workman* San Francisco County Chronicle.
(Cir. D. 504,644) January 23, 1982

A judge awarded more than 150 angry neighbors of San Francisco International Airport $750 each in claims against the airport yesterday in their long-standing dispute over control of aircraft noise.

Judge Roderic Duncan rebuked airport officials for "making almost no effort" to lessen the effects of noise described by residents who filed claims against the airport and the city of San Francisco.

During a week of testimony in South San Francisco Municipal Court, the residents told of physical and emotional stress, loss of the enjoyment of their homes and yards, and the debilitating effects that the roar and back blasts of aircraft had caused.

The California Judicial Council had assigned Duncan, an Oakland Piedmont Municipal Court Judge, to the small-claims trial because of the large number of complaints and the apparent political sensitivity of the airport issue in San Mateo County.

Before issuing his decision, Duncan told the residents that he was at first "skeptical" about the claims and the seriousness of the problem.

"It seemed to me obvious that an airport is going to cause some noise and pollution, and people who have property in the area probably should be expected to bear that inconvenience," the judge said.

"However, the magnitude of the problem appeared to be greater than I anticipated."

He said most people who testified seemed to be "reasonable people who understand and accept the fact that the airport is going to remain their neighbor . . . and that it is part of the price for a modern transportation system."

However, the price levied against the neighbors by the rumble of aircraft "is not a reasonable one," he said.

Calling the noise "a bona fide legal nuisance," Duncan said that in most cases the airport had done the property owners "at least" $750 in damage — the largest award allowed in small-claims cases.

He asked rhetorically whether his decision might have been different if the airport were making a reasonable effort to reduce the noise, but added, "I have not reached that question because it's clear to me the airport is making almost no effort in that direction."

While noting that airport officials have for some time discussed the possibility of prohibiting the noisiest aircraft, Duncan said, "There have been no promises that this might be done in the future if things got bad enough."

He added that the airport had shown little interest in "providing people with a few hours of sleep at night by adopting some sort of limited curfew."

Captain Dick Deeds, Bay Area spokesman for the Airline Pilots Association, disagreed with the judge and his decision.

The airlines have taken a number of noise-abatement steps — not all in the best interest of safety, Deeds said.

Pilots use reduced power during takeoffs and a short departure path near San Bruno Mountain "that turns us inside the mountain rather than taking us over Daly City and South San Francisco."

"How much more cooperation they can demand I don't know," he said. "The bottom line in noise abatement has

to be safety. The recent accident in Washington points that out."

Deeds also said he found it "interesting" that pilots were never called to testify during the case.

Experts who testified on behalf on the neighbors, as well as some leaders of the anti-noise group, said the state noise standards that govern the airport allowed for excessive roars and whines of aircraft, particularly during landings and take-offs.

Judge Duncan said those standards, which measure average decibel levels over time rather than so-called "single-event" noise, were "irrelevant."

By 1986, San Francisco International will be limited to an average decibel level of no more than 65 in an area ranging from a half-mile to a mile-and-a-half around the airport.

The airport is now several decibels above the current standard, which is 70 decibels, but is awaiting a decision by an administrative law judge on its request for a variance.

After the ruling, Linda Dyson, one of the leaders of the anti-noise group, was mobbed by fellow homeowners who took turns embracing her and patting her on the back.

With tears in her eyes, she called Duncan's decision "just great" and added, "We're very pleased."

City officials have said they would appeal any adverse decision, and Dyson said she expected that.

"We're ready to fight them all the way because we know we are right," she said.

The judge made the $750 award to more than 150 residents out of more than 170 who filed complaints. Notices are to be mailed out over the weekend to those who won settlements.

The claims covered alleged disturbances during a 100-day period before May 13, 1981. Similar claims, filed in September by some of the same people and others, cover damages for a different period.

Members of the anti-noise group have promised to continue filing $750 claims for future periods if the noise persists.